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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

RIDGEWOOD ASSOCIATES, INC. et al.,

Plaintiffs and Appellants,

v.

D. LAVONNE EISEMAN et al.,

Defendants and Respondents.

C053893

(Super. Ct. No. CV026958)

Ridgewood Associates, Inc. (Ridgewood) and Richard Malott, Jr. (together plaintiffs) filed an action under the Uniform Fraudulent Transfer Act (UFTA) (Civ. Code, § 3439 et seq.)¹ against their judgment debtors Gregory and Cheryl Forbes,² Cheryl's sister, D. Lavonne Eiseman, Cheryl and Gregory's daughter, Francesca Forbes, and Tactical Aircraft Corporation, a corporation formed by the Forbeses. Plaintiffs appeal the

¹ Hereafter, undesignated statutory references are to the Civil Code.

² As a number of defendants share the same last name, we will use their first names for clarity in this opinion.

summary judgment granted Eiseman and Francesca. We shall affirm the judgment.

THE UFTA

A quick overview of the UFTA is in order before we set forth the facts and pleadings of this case.

Under the UFTA a creditor may void a fraudulent transfer by a debtor to the extent necessary to satisfy the creditor's claim. (§ 3439.07, subd. (a)(1).) To the extent the transfer is voidable, the creditor may obtain a judgment against the transferee of the asset. (§ 3439.08, subd. (b); Ahart, Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2008) ¶ 3:333, p. 3-104.)

The UFTA defines a "'transfer'" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." (§ 3439.01, subd. (i).)

Two statutory sections of the UFTA provide the tests for whether a transfer is "fraudulent." Under section 3439.04, a transfer is fraudulent as to a creditor whether the creditor's claim arose pretransfer or posttransfer if the debtor made the transfer with "actual intent to hinder, delay, or defraud any creditor of the debtor" (§ 3439.04, subd. (a)(1)) or if the debtor made the transfer "[w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either: (A) [w]as engaged or was about to engage in

a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction[] [or] (B) [i]ntended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due."

(§ 3439.04, subd. (a)(2).) Under section 3439.05, a transfer is fraudulent as to a creditor whose claim arose before the transfer if the debtor made the transfer "without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer"

Under section 3439.08, subdivision (a), of the UFTA, a transfer "is not voidable *under paragraph (1) of subdivision (a) of Section 3439.04*, against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee" (Italics added.)³

³ At the time of the transfers alleged in this action section 3439.08, subdivision (a), limited the application of the good faith for value defense to subdivision (a) of section 3439.04 without specifying it was limited to paragraph (1) of subdivision (a). In 2005, the section was amended to clarify it applied only to paragraph (1) of subdivision (a) of section 3439.04. (See Stats. 2005, ch. 34, § 1, eff. July 7, 2005.) However, such limitation was already implicit because the constructive fraud theories of liability (§§ 3439.04, subd. (a)(2), 3439.05) include as an element that the transfer was made without receipt of a reasonably equivalent value. As to those theories, the good faith for value defense is unnecessary.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Chronology of Events

In this case a strict chronology of events relevant to the allegations of the first amended complaint is useful.

In the middle of January 2003, Ridgewood, through Malott, entered into an option agreement with Gregory and Cheryl to purchase their business, Flight Materials, Inc. As part of the agreement, Ridgewood provided a good faith deposit of \$300,000, which was fully refundable in the event Ridgewood elected not to exercise its purchase option. Gregory and Cheryl signed a promissory note in the amount of the deposit, payable 45 days later (March 1, 2003).

In February 2003, David and Kathleen Williams filed an unlawful detainer action against Gregory and Cheryl based on their alleged failure to exercise an option to purchase and failure to pay rent on residential property located in Lodi, California.

On March 1, 2003, Gregory and Cheryl failed to pay the Ridgewood deposit back after demand for it was made.

Sometime in February or March, Cheryl informed her sister, Eiseman, of the eviction proceeding and told her she wanted to still be able to continue to reside at the property with her daughter Francesca, but the option to purchase the property had expired. On March 14, 2003, Gregory and Cheryl entered into a settlement agreement regarding the unlawful detainer action. Under the agreement, the Williamses agreed to sell and Gregory

and Cheryl agreed to buy the Lodi residence for \$500,000. However, according to Eiseman, Gregory and Cheryl had such poor credit that they could not get a loan for the purchase of the property. Cheryl asked Eiseman to buy the property and rent it to her. Cheryl told Eiseman that if Eiseman could get a loan, Gregory would loan her \$150,000 for the down payment.

In April 2003, Malott loaned a total of \$220,000 to Gregory, represented by two promissory notes due on August 16, 2003.

Eiseman purchased the Lodi property after obtaining a first mortgage loan in the amount of \$350,000 and receiving \$157,480.99 from Gregory for the remainder of the purchase price and closing costs. Escrow closed on May 9, 2003. Cheryl and Francesca continued to live in the Lodi house. Cheryl paid Eiseman rent in the amount of the mortgage, taxes and insurance. Cheryl also paid for the utilities on the property.

On October 20, 2003, plaintiffs filed an action against Gregory and Cheryl for their failure to pay back the monies due Ridgewood and Malott.

In May 2004, Gregory Forbes formed a corporation called Tactical Aircraft Corporation.

On October 27, 2004, judgment was entered in favor of plaintiffs against Gregory and Cheryl in the amount of \$354,298.79.

Three weeks later, on November 18, 2004, Eiseman listed the Lodi property for sale. At her request the property was not entered into the multiple listing service.

Eiseman received an offer for the property on December 1, 2004. She made a counter offer, which was accepted on December 3, 2004.

On December 22, 2004, plaintiffs' former attorney sent Eiseman a letter informing her of plaintiffs' belief that she was fraudulently holding real property for Gregory and Cheryl and threatening suit against her under the UFTA.

On December 31, 2004, Eiseman wrote a letter to the escrow officer for the sale of the Lodi property instructing her to prepare a gift deed transferring the Lodi property from her to Francesca simultaneously with the close of escrow. On January 2, 2005, Eiseman retracted such instruction.

Escrow closed and a deed was recorded on the Lodi property on January 12, 2005. Out of the proceeds, Eiseman paid Gregory \$157,480.99 in the form of a cashiers check. Eiseman used the balance of the proceeds to purchase a ranch in Kentucky as an investment and so that Cheryl and Francesca could live there.

On February 8, 2005, plaintiffs filed the original complaint in this action alleging four causes of action. The first cause of action alleged a fraudulent transfer of money from Gregory and Cheryl to Eiseman in connection with her purchase of the Lodi property. The second cause of action alleged a conspiracy between Gregory, Cheryl and Eiseman to defraud plaintiffs by the Lodi real property transaction. The third cause of action alleged Gregory, Cheryl and Francesca entered into an agreement and scheme under which Tactical Aircraft Corporation was formed as a sham corporation with the

sole purpose of holding assets formerly belonging to Gregory and Cheryl. The complaint alleged assets were secretly transferred to the corporation. The fourth cause of action alleged a conspiracy by Gregory, Cheryl and Francesca to defraud creditors through the transfer of assets to Tactical Aircraft Corporation.

On April 18, 2005, plaintiffs filed a first amended complaint. As relevant here, the first cause of action was amended to specifically allege Gregory, Cheryl and Eiseman entered into an agreement and scheme under which Gregory and Cheryl transferred money to Eiseman for the purchase of the Lodi property, that Eiseman purchased the property for Gregory and Cheryl, keeping title in her name so the property was safe from creditors of Gregory and Cheryl, and that the transfer "was fraudulent as to plaintiffs as creditors since their claim arose before the transfer was made and since defendant Forbes made the transfer to defendant Eiseman without receiving a reasonably equivalent value in exchange for the transfer and the Forbes[es] were insolvent at the time or became insolvent as a result of the transfer, all *in violation of California Civil Code Section 3439.05.*" (Italics added.) The second, third and fourth causes of actions were realleged.

In May 2005, Tactical Aircraft Corporation was dissolved. The certificate of dissolution indicates the corporation had not conducted any business since the time of filing the articles of incorporation and had acquired no known assets.

II.

Summary Judgment Proceedings

Eiseman and Francesca filed a motion for summary judgment in February 2006. The motion claimed plaintiffs' action for fraudulent transfer was without merit because Eiseman was not a "debtor" as required by the UFTA for a fraudulent transfer and because the defense provided by section 3439.08, subdivision (a), for persons who take a transfer in good faith for a reasonably equivalent value, was applicable. The motion contended the evidence showed that the \$157,480.99 Gregory provided to Eiseman in connection with the purchase of the Lodi property was a loan given for reasonably equivalent value. The motion for summary judgment contended Eiseman and Francesca could not be liable for civil conspiracy even if there was a fraudulent transfer because they owed no duty to plaintiffs. As to the allegation that Francesca participated in a scheme to hide assets in Tactical Aircraft Corporation, the motion for summary judgment asserted Tactical Aircraft Corporation had been dissolved and there was no evidence to establish the alleged intent and actions by Francesca in connection with the corporation.

In their opposition to the motion for summary judgment, plaintiffs pointed out the UFTA allows recovery of a judgment against transferees and argued there was a genuine issue of material fact as to what value, if any, was given for the transfers in question. Plaintiffs set out facts relating to the purchase of the Lodi property and also asserted completely new

and additional fraudulent transfers of horses and money to Francesca. With respect to Tactical Aircraft Corporation, plaintiffs claimed Francesca was the president and signing officer for the formation of the corporation, which was set up to receive Gregory and Cheryl's personal assets, and she had knowledge of her parents' business.

Although in the argument portion of their opposition plaintiffs cited both sections 3439.04 and 3439.05, plaintiffs substantively argued only that the evidence supported a finding of a fraudulent transfer of the money used in the Lodi property purchase under section 3439.04 (a theory of liability not alleged in their first amended complaint). In plaintiffs' response to defendants' statement of undisputed fact, they agreed that Eiseman "borrowed" the sum of \$157,480.99 from Gregory with the qualification that "Eiseman borrowed at least that amount." Plaintiffs did not dispute that Eiseman "repaid the loan" made by Gregory, except to question the extent of the amount returned. Plaintiffs argued the "loan" bore no interest, was never documented, and wrongfully sheltered the money away from plaintiffs. Plaintiffs argued Eiseman's knowledge of this wrongful purpose. Plaintiffs discussed briefly the definition of good faith for purposes of the good faith transfer for value defense of section 3439.08, subdivision (a), again missing the fact that the statutory defense is only applicable to a fraudulent transfer under section 3439.04, subdivision (a)(1), a statutory theory of liability not alleged by the first amended

complaint (the complaint alleged liability only under section 3439.05 (transfer resulting in insolvency)).

Plaintiffs argued the transfers of horses and money to Francesca (matters not alleged in the complaint) were given without receiving equivalent value. Turning to the allegations regarding Tactical Aircraft Corporation, plaintiffs argued the corporation had been formed for the purpose of placing assets in it and noted defendant's statement of undisputed facts only said the corporation never did business, not that it never had any assets. Plaintiffs argued the fraudulent transfers were a sufficient "civil wrong" to support the conspiracy claims.

In reply, Eiseman and Francesca asserted plaintiffs' opposition was untimely because it had been served and filed one day late under Code of Civil Procedure section 437c, subdivision (b)(2). Eiseman and Francesca also raised evidentiary objections to plaintiffs' opposition.⁴ As to the merits, Eiseman and Francesca argued there was no evidence supporting a finding of fraudulent transfer to Eiseman under section 3439.05 because, according to defendants, liability could be imposed under section 3439.08, subdivision (b)(1) only if the good faith transfer for adequate value exception of section 3439.08, subdivision (a) did not apply. Eiseman and Francesca pointed out that plaintiffs agreed the money provided by Gregory for the

⁴ As plaintiffs do not challenge on appeal the trial court's rulings on these evidentiary objections, we have summarized the facts without considering the evidence to which an objection was sustained.

down payment on the Lodi property was a loan, which was repaid in full, making it a transfer for a reasonably equivalent value. Eiseman and Francesca argued again there was no evidence of any asset being transferred to Tactical Aircraft Corporation and plaintiffs' assertions regarding the transfers of horses and money could not be considered as they were not part of the allegations of the complaint. Without any separate tort, there could be no civil conspiracy.

The trial court ruled on the motion after considering all of the moving, opposing, and reply briefs, as well as the parties' oral arguments at the hearing.⁵ The trial court found, among other things, that plaintiffs had failed to present any evidence raising a triable issue as to whether there was fraud on the part of Eiseman regarding the loan she obtained from Gregory, that plaintiffs had failed to present any evidence raising a triable issue as to whether any assets were ever transferred to Tactical Aircraft Corporation or in turn, from Tactical Aircraft Corporation to Francesca, that the issues raised by plaintiffs regarding other transfers of property to Francesca were not properly before the court, and that plaintiffs had failed to raise any triable issue of fact

⁵ On appeal, Eiseman and Francesca argue plaintiffs' opposition should not be considered as it was not timely filed. The trial court chose to consider plaintiffs' opposition and we will not interfere with the trial court's discretion to regulate the submission of materials in connection with pending motions. (*Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 625, disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031.)

regarding defendants' commission of a tort or breach of duty to plaintiffs as necessary to support the causes of action for civil conspiracy. The trial court granted summary judgment in favor of Eiseman and Francesca. Plaintiffs appealed the judgment.

Subsequently, plaintiffs notified this court of bankruptcy proceedings entitled *In re Cheryl Forbes, Debtor*, pending in the United States Bankruptcy Court for the Eastern District of Kentucky, Lexington Division, case No. 05-54580, that resulted in a bankruptcy automatic stay of these appellate proceedings. (11 U.S.C.S. § 362, subd. (a).) On February 17, 2009, this court received notice that such stay had been terminated and on March 4, 2009, we recommenced appellate proceedings. We now consider whether the trial court properly granted summary judgment.

DISCUSSION

I.

Standard of Review

Summary judgment is properly granted where the moving party establishes that no issue of fact exists to be tried. (Code Civ. Proc., § 437c, subd. (c); *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 835.) A defendant may demonstrate entitlement to summary judgment either by showing one or more elements of each cause of action cannot be established, or by establishing an affirmative defense. (*Jacobs v. Fire Ins. Exchange* (1995) 36 Cal.App.4th 1258, 1268.)

Since a summary judgment motion raises only questions of law, our review is de novo, applying the same analysis required of the trial court. (*Jacobs v. Fire Ins. Exchange, supra*, 36 Cal.App.4th at p. 1268.) We analyze the issues framed by the pleadings, decide whether the moving party has established facts that negate the opposing party's claims and, where the moving party has made a prima facie showing justifying summary judgment, determine whether the opposing party has demonstrated the existence of a triable issue of material fact. (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)

The first step in this analysis is critical because the allegations of the complaint delimit the scope of the issues on summary judgment. (*Couch v. San Juan Unified School Dist.* (1995) 33 Cal.App.4th 1491, 1499.) We need not address theories that were not raised in the pleadings (*Williams v. California Physicians' Service* (1999) 72 Cal.App.4th 722, 738), and a plaintiff may not defeat a summary judgment motion by producing evidence to support claims outside the issues framed by the pleadings. (*City of Hope Nat. Medical Center v. Superior Court* (1992) 8 Cal.App.4th 633, 639.)

II.

The Trial Court Properly Granted Summary Judgment

The confused arguments of the parties below and on appeal require us to carefully focus our de novo review on the actual pleadings and evidence before the trial court.

Plaintiffs' first cause of action in the first amended complaint alleges the transfer of the money to Eiseman for the

down payment on her purchase of the Lodi property was a fraudulent transfer under section 3439.05.⁶ Such section provides a transfer is fraudulent as to a current creditor if the debtor made the transfer "*without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer*" (Italics added.)

In the motion for summary judgment, Eiseman submitted evidence that the money she received from Gregory for the down payment was a loan, not a gift, and that she repaid the loan in full. In response, plaintiffs admitted Eiseman "borrowed" the money from Gregory for the down payment. Plaintiffs admitted it was a "loan." Plaintiffs admitted it was repaid. The only qualification expressed by plaintiffs was the amount of such loan and repayment. Plaintiffs suggested the amount could have been more than the \$157,480.99 reflected by the documentary evidence submitted by defendants. Thus, plaintiffs admitted Gregory provided Eiseman money in exchange for a promise of repayment, admittedly without interest, but in the full amount of the loan. Essentially, plaintiffs admitted Gregory received

⁶ Section 3439.05 [Transfer resulting in debtor's insolvency] provides: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation."

a reasonably equivalent value (Eiseman's promise to repay in full) in exchange for the transfer.⁷ Although plaintiffs argued the loan wrongfully sheltered the money away from plaintiffs, such argument went to a cause of action for actual fraud under section 3439.04, subdivision (a)(1), not the cause of action plaintiffs actually alleged.⁸ The trial court properly granted

⁷ It is undisputed Eiseman also agreed to allow Cheryl and Francesca to continue to live at the home for rent in an amount not exceeding the mortgage, taxes, and insurance. This can be viewed as additional consideration for the loan of the down payment.

⁸ Section 3439.04 [Transfer with intent to defraud or transfer not given in exchange for value: Determining actual intent] provides:

"(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

"(1) With actual intent to hinder, delay, or defraud any creditor of the debtor.

"(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:

"(A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

"(B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due. [¶] . . . [¶]

"(c) The amendment to this section made during the 2004 portion of the 2003-04 Regular Session of the Legislature, set forth in subdivision (b), does not constitute a change in, but is declaratory of, existing law, and is not intended to affect any judicial decisions that have interpreted this chapter."

summary judgment on the evidence submitted with respect to the first cause of action alleged under section 3439.05.

The trial court also properly granted summary judgment on the third cause of action, which alleged the fraudulent transfer and hiding of assets in Tactical Aircraft Corporation, a sham corporation formed for such purpose. Plaintiffs submitted no evidence refuting defendants' evidence that such corporation was dissolved without ever doing business or acquiring any assets.

As summary judgment was properly granted on the two causes of action alleging fraudulent transfers, summary judgment was also properly granted on the civil conspiracy causes of action. "[T]here is no separate tort of civil conspiracy, and there is no civil action for conspiracy to commit a recognized tort unless the wrongful act itself is committed and damage results therefrom." (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 44, p. 107; see *Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 631 [102 Cal. Rptr. 815, 498 P.2d 1063] ['A civil conspiracy however atrocious, does not per se give rise to a cause of action unless a civil wrong has been committed resulting in damage'].)" (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 574, italics omitted.)

The trial court properly granted summary judgment on all of the causes of action pled by plaintiffs.

Plaintiffs, however, ask this court to reverse the trial court's grant of summary judgment because after the summary judgment was granted and based on additional evidence subsequently discovered, the Kentucky bankruptcy court found the

transfer of money from Gregory to Eiseman for the down payment on the Lodi property was fraudulent and that the transfer of proceeds from the sale of the Lodi property to purchase the Kentucky property was fraudulent. According to plaintiffs, "[t]his means that a reasonable trier of fact found against Eiseman on a substantially similar claim and therefore the trial court's finding is erroneous because, at a minimum, there is a genuine issue of material fact."

We have denied plaintiffs' request for judicial notice of the transcript of hearing before the bankruptcy court and the order of judgment entered by that court. The fact that a court reached a different conclusion on different evidence and on a different cause of action under bankruptcy law is not relevant or helpful to our de novo review of the evidence submitted to the trial court on the cause of action pled here. (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 418.) In conducting our review, we determine "the validity of a summary judgment . . . solely by the sufficiency of the affidavits which were before the court when the motion was heard, . . . consider[ing] only the facts before the trial court at the time it ruled on the motion [citations]." (*Jacobs v. Retail Clerks Union, Local 1222* (1975) 49 Cal.App.3d 959, 966; accord *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 640.)

Plaintiffs next argue there is a triable issue of fact as to whether Gregory's loan to Eiseman for the down payment on the Lodi property was a fraudulent transfer under section 3439.04 and whether the good faith for value defense applied. Just as

they did in the trial court, plaintiffs argue on appeal a statutory theory of liability (and against a defense applicable only to such statutory theory) that is not pled in the first amended complaint. Plaintiffs misunderstand the nature of a summary judgment proceeding.

“‘The purpose of a summary judgment proceeding is to permit a party to show that material factual claims arising from the pleadings need not be tried because they are not in dispute.’ [Citation.] ‘The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues: the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings.’ [Citations.]” (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381.) A plaintiff may not avoid a summary judgment by producing evidence to support claims outside the issues framed by the pleadings. (*City of Hope Nat. Medical Center v. Superior Court, supra*, 8 Cal.App.4th at p. 639.)

Here, plaintiffs did not plead liability generally or specifically under section 3439.04. They pled only section 3439.05. They never sought leave to amend the complaint to add any other theory of liability. Any request to amend the complaint at this juncture, on appeal, would come too late. (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264-1265.)

We will not consider evidence outside the issues framed by the first amended complaint as it stood.⁹

Plaintiffs contend they presented evidence that Francesca received both horses and money from her parents when Gregory and Cheryl's assets should have been going to plaintiffs to satisfy their judgment. Plaintiffs argue there is a triable issue of fact whether such gifts were fraudulent transfers under the UFTA. The trial court correctly ruled these contentions were not properly before it. There are simply no allegations regarding such transfers in the first amended complaint. "'It is well settled that documentary evidence filed in opposition to a defendant's motion for summary judgment may not create issues outside the pleadings, nor is it a substitute for an amendment of the pleadings.'" (*Couch v. San Juan Unified School Dist.*, *supra*, 33 Cal.App.4th at p. 1500, quoting *Robinson v. Hewlett-Packard Corp.* (1986) 183 Cal.App.3d 1108, 1132.)

⁹ When this court noted at oral argument that the issues on summary judgment are limited by the complaint, plaintiffs seemed to argue an exception for when the parties and trial court base their argument and ruling on the unpled matter or theory. Plaintiffs cited no authority for this position and it is contrary to the law regarding how the issues are framed for summary judgment, which we review de novo. (See *Chavez v. Carpenter*, *supra*, 91 Cal.App.4th at p. 1438; *Couch v. San Juan Unified School Dist.*, *supra*, 33 Cal.App.4th at pp. 1499-1500; *City of Hope Nat. Medical Center v. Superior Court*, *supra*, 8 Cal.App.4th at p. 639.) While not necessary to this opinion, we also note summary judgment would have been appropriate under section 3439.04, subdivision (a)(2), as plaintiffs admitted, as we have previously discussed, Gregory received a reasonably equivalent value for the loan of the down payment.

Plaintiffs respond that the trial court abused its discretion in denying their motion to amend the complaint to include the newly confirmed facts regarding Francesca's receipt of the horses and money from her parents. Such contention assumes plaintiffs made a motion to amend that was denied by the trial court. In fact, plaintiffs included no such request in their opposition and filed no such written motion even though the reply of Eiseman and Francesca pointed out the facts were outside the scope of the current pleadings.¹⁰ Plaintiffs refer us to a portion of the reporter's transcript of the hearing on the motion for summary judgment for a supposed oral motion to amend. At the point to which we are cited, counsel for plaintiffs was arguing Francesca participated in a scheme to shelter the assets of her parents, "whether it was held by [Francesca] individually or as Tactical Aircraft." Plaintiffs' counsel then stated: "The defendant in this case is Francesca Forbes and Tactical Aircraft. And certainly a difference as to -- between Tactical Aircraft and Francesca . . . individually is something that can be easily corrected, should [t]he Court allow it, to allow the pleadings to conform to the evidence."

¹⁰ We reject plaintiffs' claim, made in their reply brief, that they did not have time to file any written request or motion to amend because they only confirmed these transfers were made to Francesca when they deposed her 18 days before their opposition to the motion for summary judgment was due, 36 days before the scheduled hearing on the motion. Such time was more than adequate to file the necessary motion. We also note there is no indication in the record plaintiffs sought a continuance of the motion to obtain necessary discovery as permitted by Code of Civil Procedure section 437c, subdivision (h).

Contrary to plaintiffs' argument in their reply brief that counsel for Eiseman and Francesca understood these comments as an oral motion to amend, counsel for Eiseman and Francesca never responded with argument addressing amendment of the complaint. Counsel only noted the evidence regarding Francesca's receipt of horses and money from her parents could not be brought in as the evidence was outside of the pleadings. The trial court made no ruling regarding any motion to amend the complaint. We agree with Eiseman and Francesca that counsel's comments were not sufficient or specific enough to constitute an oral motion to amend the complaint to include the newly claimed fraudulent transfers. A party must do more than suggest a "correction" to pleadings can be made to trigger the trial court's duty to consider whether to allow substantive amendment of a complaint at the stage of oral argument on a motion for summary judgment.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents. (Cal. Rules of Court, rule 8.278(a).)

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P. J.

NICHOLSON, J.